87-346

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

—o—

CARLOS FERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether petitioner was denied his rights under Rule 43 of the Federal Rules of Criminal Procedure and under the Confrontation and Due Process Clauses of the Constitution when the district court insisted that the trial proceed and testimony be received against petitioner even though he was too sick to be present?

2. Whether petitioner was denied a fair trial when a detective involved in the investigation of this very case was permitted to testify as an "expert" on the use of code words by drug dealers and then to identify specific conversations of petitioner as coded discussions involving drugs?

3. Whether petitioner was denied a fair trial when six of eight defendants pled guilty during trial and the district court failed to instruct the jurors adequately regarding their absence?

4. Whether participating in a drug conspiracy in violation of 21 U.S.C. § 846 can serve as one of the predicate acts required to convict a person of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, even though the former is a lesser-included offense of the latter?

PARTIES TO THE PROCEEDING BELOW

In addition to the parties shown in the caption, David Barco was an appellant in the consolidated appeal below.

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No. .....

—o—

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CARLOS FERNANDEZ,

Petitioner,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

Petitioner Carlos Fernandez respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on June 30, 1987.

—o—

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit, which is currently unreported, is reprinted in the Appendix at App. 1.

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JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, affirming a judgment of conviction of the United States District Court for the District of New Jersey, was entered on June 30, 1987. (App. 14) This petition for certiorari is filed within 60 days of the date of that judgment in compliance with Rules 20.1 and 20.4. The Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

———o———

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty or property, without due process of law. . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

Title 21, United States Code:

§ 848. Continuing criminal enterprise

. . .

Continuing criminal enterprise defined

(d) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if —

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony; and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management; and

(B) from which such person obtains substantial income or resources.

Federal Rules of Criminal Procedure:

Rule 43. Presence of the Defendant

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall

be considered to have waived the right to be present whenever a defendant, initially present,

> (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or
>
> (2) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom. . . .

Federal Rules Of Evidence:

> Rule 702. Testimony By Experts
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

———o———

STATEMENT OF THE CASE

Petitioner was sentenced to 40 years' imprisonment and fined $300,000 after a jury found him guilty of engaging in a continuing criminal enterprise (21 U.S.C. § 848), conspiracy to distribute cocaine (21 U.S.C. § 846), conspiracy to import cocaine (21 U.S.C. § 963) and using a communications facility to further narcotics violations (21 U.S.C. § 843(b)).

Based on information supplied by Mario Alvarez, a state prison inmate, the Drug Enforcement Administration ("DEA"), along with New Jersey law enforcement agen-

cies, began an investigation of petitioner and an organization he allegedly headed which Alvarez said was engaged in the importation and distribution of cocaine. The investigation, which employed extensive electronic surveillance and the execution of numerous search warrants, culminated in the arrest of petitioner and many alleged co-conspirators in March 1985. A 29-count indictment ensued charging petitioner, David Barco and six other defendants with various narcotics offenses.

1. All eight defendants proceeded to trial. Alvarez, who testified for three weeks, was the Government's principal witness. From June 1977 to July 1982, Alvarez worked for petitioner, travelling from Elizabeth, New Jersey, to New York and receiving cocaine, processing it for distribution and delivering it to various places. He brought large sums of money to locations in New Jersey and transported it to Miami, Florida. There he received cocaine for transportation back to New Jersey or New York. In addition, Alvarez testified that, when petitioner's source of cocaine in Miami refused to provide more, petitioner arranged for a shipment from Columbia.

In September or October 1981, according to Alvarez, the cocaine ring began to operate out of Barco's travel agency, American Tours, in Elizabeth. Alvarez would take to American Tours money that he collected from cocaine sales and give it to Barco. In the Summer of 1982 Alvarez left petitioner's employ, but afterwards would still see him at American Tours.

The testimony of Juan Pastor, another cooperating witness, was the focal point of the rest of the Government's case. Pastor, along with Diego Mejia, had been arrested

at a roadblock in New Mexico in October 1983. When the state troopers searched his car, they found a large quantity of cocaine. Pastor testified that in 1982 and 1983, at petitioner's direction, he made several trips by car from Miami to various locations throughout the country in order to either pick up or deliver packages ostensibly containing cocaine. On these trips Pastor would usually meet petitioner at the destination.

The fruits of searches of numerous locations in New York, New Jersey and Florida, as well as taped conversations obtained through electronic surveillance, were introduced by the Government in an effort to corroborate the testimony of Alvarez and Pastor. Among the items seized were cocaine, a money counting machine, firearms, scales and other narcotics paraphernalia, cash, gems, photographs and documentary evidence such as leases and receipts.

2. The electronic surveillance evidence consisted of court authorized wiretaps of telephone conversations held in 1980, 1984 and 1985. An electronic listening device was also placed in the rear room of American Tours. These taped conversations were offered by the Government both to tie the alleged co-conspirators together and as substantive evidence of cocaine dealing. Its case was bolstered in this respect by the testimony of Victor Irizarry, a New Jersey State Police detective, who had participated in the wiretaps conducted from November 1984 to March 1985.

Irizarry was positioned as an "expert witness in the field of code words and language," specifically in regard to the interpretation of telephone calls by Hispanics in-

volved in drug trafficking. The Government, however, conceded that Irizarry's opinion would not be based simply on overall experience, but would be derived from his participation in these very wiretaps. Accordingly, Irizarry acknowledged that his opinion that certain phone conversations involved talk of drug transactions was based on "the background and the suspicion" which he already had.

Detective Irizarry testified that, in his opinion, numerous taped phone conversations of petitioner involved discussions of drug trafficking, spoken in code. For example, in a phone conversation of November 13, 1984 between petitioner and an unknown male in Colombia, petitioner said: "I call you over there last night and I was told that you were at the farm." Irizarry testified:

> Well, it's been my experience that in Colombia the farms are significant to us who are listening when we feel the people are involved in narcotics trafficking because the farms are where they go to either store the goods or where the actual farming takes place for the cocaine. In this particular case I would say a storage area.

Later in the conversation petitioner states: "Those replacements that you asked me for are going to rust, brother." When the prosecutor asked Irizarry, "based on your expertise," what petitioner meant, Irizarry responded: "When he talks about replacements . . . , generally it's money." Replying to the prosecutor's leading question as to whether that money was cash, Irizarry testified: "I would say it's a cash amount, yes, sir."

In a conversation on November 15, 1984, petitioner said to David Barco: "It's Amporo and Yolanda, right?"

Irizarry testified: "It's very common language among drug distributors to use cocaine as girls, or they will just throw out female names to indicate a package." Again the prosecutor enhanced the worth of this testimony: "You testified that in your experience, based on your 20 years, that drug dealers will use the . . . names of girls, Amporo, for example, Amporo and Yolanda. When they use two names . . . are they referring to one package, two packages?" Irizarry replied that it was two packages.

In a conversation on November 29, 1984 Barco said: "I have a person who needs . . . [hesitation] . . . to buy a little car, brother." Irizarry interpreted this as follows:

Q And what is your understanding of that?

A Well, he asked him if he had a friend who wanted to buy a little car. To me that was something illegal by the way it was said. It was a code word.

Q A code word for narcotic substance?

A Yes.

In an intercepted conversation on February 20, 1985, Maria Trujillo said to Carlos Fernandez: "And are you bringing those creams for the hair?" Irizarry testified that the word "creams" meant cocaine and explained the basis for this conclusion:

A She's asking him if he's bringing something up and she uses the word creams here and he doesn't understand what she's talking about at that moment.

He says, "What?"

And then she further goes on to say, "Are you going to bring the creams for the hair?"

And he says, "Oh, certainly."

Q And—

A So then he understands what she's saying.

3. Although eight defendants proceeded to trial, six pled guilty at various stages of the Government's case-in-chief. In his opening remarks the prosecutor, after describing the conspiracy that the Government would prove, had stated: "Mario Alvarez pled guilty to this very conspiracy, that is right, and Mario Alvarez is exposed to a sentence of up to 15 years in jail."

Five weeks later, toward the end of Alvarez's testimony, codefendants Francia Rivera, Nelson Lasso and Alberto Marin pled guilty. The court simply advised the jury:

> I'm sorry we had the delay, but we simplified the proceedings a little bit. I will be dealing with certain of the defendants in separate proceedings, so we will no longer have with us Miss Rivera, Mr. Marin and Mr. Lasso. So that will shorten matters somewhat, and so I think that's something.

On the following morning codefendant Ada Velez pled guilty, but, when the jury convened, not a mention was made nor an instruction given regarding her absence. At the noon recess the prosecutor alerted the judge to this fact, but the court responded: "I was wondering if we could just slip by that one for the time being." The court added: "We'll advise the jury eventually, but I don't see any need now unless any defendant does." No counsel objected.

Following two more days of evidence, codefendant Reuben Concha pled guilty. The court merely advised the jury:

> I have also severed the proceedings against two other defendants. I mentioned three whom I'm dealing with in a matter separately. Mrs. Valdez and Mr. Concha, the proceedings against them will be separate from the remaining defendants.

A sixth defendant, Antonio Borja, held out for two more weeks, but pled guilty near the conclusion of Juan Pastor's testimony. Even though there were now only two defendants remaining, rather than the three who had been in front of the jury for the previous two weeks, no instruction whatsoever was given to the jurors, despite counsel's alerting the court to this circumstances:

> DEFENSE COUNSEL: Judge, there is another person missing once again.
>
> THE COURT: Well, just go ahead—
>
> DEFENSE COUNSEL: Go ahead without saying anything?
>
> THE COURT: Yes.

No explanation was ever given to the jury regarding Borja's sudden disappearance.

4. During presentation of the Government's direct case on Friday, November 15, 1985, Fernandez became incapacitated by a stomach virus at the lunch break. The genuineness of his illness was never in dispute and was verified by a doctor's report ordered by the court. Indeed, Fernandez actually had to carry a trash can with him back into the courtroom after the lunch recess in case he became ill again.

Before the afternoon session began, the trial court inquired into the state of Fernandez's health. Because he was too ill to remain in the courtroom, the court decided to interrupt defense counsel's cross-examination of Detective Guslavage, a prosecution witness who gave evidence against Fernandez, and to postpone its completion until Fernandez could be present again. However, the court decided not to stay all proceedings in the interim, but rather to take other witnesses instead, saying "we can't hold up the trial for that." The court subsequently reconvened the jurors, informed them of Mr. Fernandez's illness, and dismissed them for the day. The court then ordered that Mr. Fernandez be examined and treated and that a doctor's report be available on the following Monday.

On Monday, November 18, the next trial day, Fernandez was still sick and thus absent from the courtroom. The court acknowledged his continued illness, having, in fact, already signed an order directing the marshals to take him to the hospital for further examination and treatment. The trial judge then stated it was his understanding that Fernandez had agreed to permit the court to proceed with certain witnesses in his absence. Defense counsel cautioned that Fernandez's consent not to be present was based solely on the fact that the government witnesses to be called that day would refer to things that had nothing to do with him. Counsel stressed that should Fernandez still be ill on the following day (Tuesday), there was no consent to the trial continuing in his absence. The court, accepting this stipulation, reiterated Fernandez's position: "He has agreed that we may proceed without him, and we'll take it day by day."

On Tuesday, November 19, Fernandez, though present in the courtroom, was obivously still ailing. Defense counsel informed the court that Fernandez was still sick and had not been given any medicine. According to defense counsel, Fernandez wanted to absent himself from the trial with the same conditions as the day before—that is, as long as there were witnesses who could be called who had no bearing on his case. The court, however, in refusing to alter the order of proof, replied:

> I'm going to have to proceed with the trial in the normal course. We have the doctor's report and they show that it's an uncomfortable ailment which time can cure, a stomach virus, and it's never pleasant, but it's one that can be handled.
>
> I'm going to have to proceed in the normal course. Mr. Fernandez may either stay, or if he wishes to absent himself I would permit that.

Faced with this Hobson's choice—either to remain, though physically incapacitated, or to leave and miss crucial testimony—Fernandez, through defense counsel, objected to the court's ruling: "Your Honor, he would rather go back to MCC [Metropolitan Correctional Center], and yet he would not want to miss anything in the proceedings. I don't know what the solution is." The court, however, merely repeated its "choice." Defense counsel, acutely aware of his client's discomfort, requested that he be allowed to leave. The court granted the request, concluding for the record, "And waiving his right to be here as we proceed."

When Fernandez, prior to leaving the courtroom, heard that Detective Guslavage was apparently to be cross-examined later that day, even in his absence, he requested

an adjournment. The court questioned whether that request meant that Fernandez had decided to remain in the courtroom after all. Defense counsel replied, "He doesn't want to, but he'll stay."

Later, however, while a DEA chemist was giving testimony, Fernandez was forced to leave suddenly to avoid becoming ill right in the courtroom. Defense counsel consented to the witness then on the stand continuing his testimony. Upon his return from the bathroom, still not feeling well, Fernandez finally gave in to his affliction and requested to return to the MCC. Again the court, obviously waiver conscious, confronted Fernandez's counsel with the dilemma: "Back to the MCC and allow us to proceed [?]" Thus Fernandez was faced with the choice of losing his right to be present at trial or succumbing to "the runs." Counsel replied: "Yes, sir."

During petitioner's absence, among the prosecution witnesses who testified against him was Michael Devlin, a DEA agent. He testified that he had searched petitioner's safe deposit box and found a number of valuable gems, $3,000 in cash and petitioner's name on the record of access. Petitioner, recovering from a stomach virus, returned to the courtroom the following day.

5. Only petitioner and Barco put in a defense. Petitioner's defense was aimed primarily at impeaching the credibility of Alvarez and Pastor. Counsel for petitioner argued to the jury that the cooperating witnesses may very well have conformed their testimony to the Government's physical evidence, and that the physical evidence, therefore, did not establish that their testimony was truthful.

———o———

REASONS FOR GRANTING THE WRIT

Point I

Petitioner was denied his rights under Rule 43 of the Federal Rules of Criminal Procedure and the Confrontation and Due Process Clauses of the Constitution when the district court insisted that the trial proceed and testimony be received against petitioner even though he was too sick to be present.

Petitioner, anxious to be present when testimony came in against him, was denied that right because he became too sick to remain in the courtroom. A criminal defendant's right to be present at his trial is a fundamental constitutional right guaranteed by the Sixth Amendment, which provides that "[i]n all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him." One of the most important rights provided under the clause "is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen,* 397 U.S. 337, 338 (1970).

Rule 43 of the Federal Rules of Criminal Procedure likewise guarantees a criminal defendant's right to be present at trial. Rooted in the confrontation clause of the Sixth Amendment, *Illinois v. Allen,* the due process clause of the Fifth Amendment, *United States v. Gagnon,* 105 S.Ct. 1482 (1985), and the common law right of presence, *Snyder v. Massachusetts,* 291 U.S. 97 (1934), Rule 43 implements "[a] leading principle that pervades the entire law of criminal procedure . . . that, after indictment . . ., nothing shall be done in the absence of the prisoner." *Lewis v. United States,* 146 U.S. 370 (1892). Though the right to be present is not absolute, *Illinois v. Allen,* the defendant's

presence is fundamental to the basic legitimacy of the criminal process. *Cf. Lewis,* 146 U.S. at 372-373 (dictates of humanity require defendant's presence). It cannot be satisfied vicariously by the presence of defense counsel; the personal presence of the defendant is required.

A defendant may waive his right to be present by voluntarily and deliberately absenting himself from the trial without good cause. Rule 43(b); *Taylor v. United States,* 414 U.S. 17 (1973). Petitioner did not effectively waive his right to be present. To be effective a waiver must be "an intentional relinquishment or abandonment of a known right or privilege." *Illinois v. Allen.* Although an implied waiver may be found if the defendant absconds, *Diaz v. United States,* 223 U.S. 442 (1912), or otherwise willfully makes himself unavailable, *Taylor v. United States,* a bona fide illness does not constitute waiver. Where a defendant's illness during trial is genuine, no other course except adjournment or severance can be condoned.

Petitioner's absence from trial on Tuesday, November 19, due to a genuine stomach virus verified by medical reports, was not a voluntary waiver of his right to be present at his trial. Indeed, defense counsel had earlier stressed that petitioner was voluntarily absenting himself from the proceedings on Monday, November 18 *only* and then *only* on the condition that any testimony not relate to him.

Yet, on Tuesday, with an obviously still stricken defendant before it, the court refused to stay the proceedings or alter the order of proof, even though petitioner was physically unable to remain. Although the court, for the record, elicited a "waiver," certainly it was voluntary only in the sense that petitioner willed his physical movement

out of the courtroom. In no way did he wish to relinquish his right to be present. A person with no real choice cannot give a voluntary waiver. Fernandez obviously desired to be present.

This is not a case like *United States v. Gagnon*, where the Court held that the defendants' Rule 43 right to attend an *in camera* conference attended by the judge, defense counsel and a juror was waived because of the defendants' "total failure to assert their rights to attend the conference." 105 S.Ct. at 1485-1486. Here, it could not be clearer, petitioner was vigorously asserting his right to be present and yielded this right only when physically unable to remain in the courtroom. If that was a waiver, it was not a voluntary one.

In deference to petitioner's illness, it would have been far fairer had the trial court simply adjourned the trial for the day. This was no longer a multiple-defendant trial, and petitioner, having received medical attention, was in attendance the following day. Or, if the trial court absolutely refused to hold up the proceedings for even a day, it could have operated as it had in petitioner's absence on Monday: it could have protected petitioner's right to be present by proceeding with witnesses whom he did not need to confront. The court, in doing neither, failed to safeguard petitioner's valued right to be present.

Petitioner was absent, not merely during *voir dire* or an in chambers conference, but while a DEA agent was giving testimony that established one of the essential elements of engaging in a continuing criminal enterprise, obtaining "substantial income or resources." *See* 21 U.S.C. § 848(b)(2)(B). Thus the very core of the right to con-

front witnesses is implicated, i.e., to be physically present when a prosecution witness' direct testimony is being offered against the defendant. This Court should, therefore, grant certiorari to decide whether trial courts are now free to take testimony against defendants who, due to genuine illness, have no choice but to absent themselves from the proceedings.

Point II

Permitting a detective involved in the investigation of this very case to testify as an "expert" on the use of code words by drug dealers and then to identify specific conversations of petitioner as coded discussions involving drugs deprived petitioner of a fair trial.

The admission of Detective Irizarry's "expert" testimony under Rule 702 of the Federal Rules of Evidence denied petitioner a fair trial. It has been said that admission of expert testimony to explain the use of narcotics codes "may have the effect of providing the government with an additional summation by having the expert interpret the evidence." *United States v. Nersesian*, Dkt. No. 86-1211, slip op. 4063, 4086 (2d Cir. June 29, 1987). The unfairness of such a practice becomes manifest where, as here, the "expert" has been involved in the investigation of the case itself. As Judge Friendly once observed:

> [T]here is something rather offensive in allowing an investigating officer to testify not simply that a certain pattern of conduct is often found in narcotics cases, leaving it for the jury to determine whether the defendant's conduct fits the pattern, but also that such conduct fitted that pattern, at least when other inferences could have been drawn not unreasonably

> although perhaps not as reasonably as that to which the expert testified.

United States v. Brown, 776 F.2d 397, 401 (2d Cir. 1985); *see also United States v. Young*, 745 F.2d 743, 765-766 (2d Cir. 1984) (Newman, CJ., concurring) ("The risk [of prejudice] is increased when the opinion is given by 'the very officers who were in charge of the investigation' ").

This is not a case where the testimony of an expert was necessary to prove the prosecution's case. First, whatever his credentials may or may not have been, Detective Irizarry's *testimony* hardly reflected the "scientific, technical, or other specialized knowledge" required by Rule 702. Irizarry's conclusions were based on such unremarkable grounds as hearing the speaker hesitate or search for a word before saying "little car" or "cream for the hair." Surely the jury was capable of drawing its own conclsuions from this commonplace circumstance. No "expertise," based on "twenty years experience" investigating narcotics cases, was required.

This is so with regard to almost all of Irizarry's "opinions." In most cases they were based simply on the context of the statement; in fact, Irizarry admitted as much. The jurors could just as easily have interpreted the meaning from the context. As the Court of Appeals acknowledged, "the jury could certainly have concluded that the circumspect nature of the calls was consistent with a conspiracy to consummate the cocaine transaction." (App. 12) In other instances, Irizarry's conclusions were based, improperly for an "expert," on the background and suspicions he already had concerning this very case. Finally, Alvarez had *already* testified that the defendant's phone

conversations were in code and referred to drug transactions.

Because law enforcement officers are "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), there is, in effect, a presumption that their judgments are not disinterested. This is not to say, of course, that a law enforcement officer should never be permitted to testify or give his opinion as to a particular fact unknown to laymen. *See, e.g., United States v. Riccobene*, 709 F.2d 214, 230 (3d Cir. 1983) (FBI agent's expert testimony properly admitted for limited purpose of defining certain terms not generally known, such as "consigliere," "capi" and "La Cosa Nostra"). But where, as here, an agent involved in the investigation of a case is permitted to testify at length as an "expert" regarding his personal, pre-conditioned interpretations of non-technical statements by the defendants, any sense of fair play and substantial justice is offended.

Even if Irizarry's testimony were properly admitted under Rule 702 as a proper exercise of the trial judge's discretion, it should still have been excluded as unfairly prejudicial under Rule 403. Such testimony has, at best, "slight probative value." *United States v. Young*, 745 F.2d at 765. Yet here it served not only to improperly influence the jury, but also to bolster the testimony of Alvarez. The credibility of his testimony was the central issue of the trial, and the detective's "expert" opinion on the use of code words gave that testimony the stamp of authority.

The prosecutor was free to argue, based on Alvarez's testimony and the circumspect nature of the phone calls,

that these calls involved drug dealing. It was patently unfair to permit Detective Irizarry to give an "additional summation" to the same effect, particularly in view of the "aura of special reliability and trustworthiness," *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979), and "mythic infallibility," *United States v. Downing*, 753 F.2d 1224, 1239 (3d Cir. 1985), surrounding such "expert" testimony. This Court should therefore grant certiorari to delimit its use.

Point III

Petitioner was denied a fair trial when six of eight defendants pled guilty during trial and the district court failed to adequately instruct the jurors regarding their absence.

To convict petitioner of the conspiracies charged in the indictment the prosecution was required to prove beyond a reasonable doubt that, first, those conspiracies existed and, second, that petitioner was a member. The Government's burden of proving the first element—the existence of the conspiracies—was substantially, if not completely, relieved by the circumstance that six of eight defendants pled guilty during the trial and Alvarez, the jury was told, had pled guilty to the very conspiracies charged in the indictment.

In *United States v. Beasley*, 519 F.2d 233, 239 (5th Cir. 1973), the court pointed out:

> The crime of conspiracy by its very nature may lend itself to an improper jury finding of guilt by association with those found to be participants in the conspiracy rather than the required finding of guilt based upon proof beyond a reasonable doubt that the defendant participated in the conspiracy. This danger of transferred guilt is acute in this case where

> the evidence against the sole remaining defendant repeatedly refers to his relationship with persons who had suddenly and unexplainedly disappeared from the trial. "The potential prejudice of such an occurrence is obvious . . . ." [citation omitted]

The *Beasley* court noted that "in the absence of some stated reason for a codefendant's departure, a jury might speculate that a guilty plea has been entered which implicates all the defendants." *Id.*

Courts are divided on whether a trial judge should tell jurors that a codefendant has pled guilty. *Compare United States v. Jones,* 425 F.2d 1048, 1054 (9th Cir. 1970), and *United States v. Beasley* (honest statement to jury that codefendant has pled guilty is best) *with United States v. Baez,* 703 F.2d 453, 455 (10th Cir. 1983) (preferable to explain simply that codefendants are absent for legally sufficient reason and jury should not speculate). Courts are in agreement, however, that the jury must be instructed that codefendants' absence has nothing to do with the remaining defendants' guilt. *See, e.g., United States v. Griffin,* 778 F.2d 707, 710 n. 5 (11th Cir. 1985); *United States v. De Lucca,* 630 F.2d 294, 298 (5th Cir. 1980); *United States v. Jones; United States v. Beasley.*

In the instant case, the trial judge failed to instruct the jury not to speculate or draw adverse inferences from the codefendants' absence. Moreover, the jury was told absolutely *nothing* regarding one of the defendants who pled guilty. Antonio Borja's sudden absence from trial passed completely without comment. We have found no case in which the court's total failure to instruct the jury regarding such an absence has been excused.

It is important to note that Borja was one of only three defendants who remained on trial after the other five codefendants pled guilty. One has to visualize the scene in which only two defendants are now at the defense table as the jurors enter the courtroom, and the eerie absence of the third goes unexplained. One can almost hear the mutterings of the jurors as they speculate on the reason for Borja's sudden absence.

Surely a trial court cannot be permitted, in effect, to "pretend" that nothing has happened and, by its silence, to invite the jury to join in the fiction. From that point on, the trial process was stripped of its integrity and thus became a mockery of the proper administration of justice.

It would be naive to suppose, under these circumstances, that the jurors in this case did not speculate that the absent defendants had pled guilty. Thus the jury may have regarded the issue of the remaining defendants' guilt as settled and the trial as a mere formality. This is all the more so because a guilty plea entered by a codefendant can be especially prejudicial if the plea is made to a conspiracy with which the remaining defendants are charged. *See Krulewitch v. United States*, 336 U.S. 440, 454 (1949) ("It is difficult [in a conspiracy trial] for the individual to make his own case stand on its own merits in the minds of the jurors who are ready to believe that birds of a feather are flocked together").

Here, where the prosecutor told the jurors at the outset of the trial that Alvarez had pled guilty to the very conspiracy charged in the indictment and where six codefendants pled guilty during trial, without any cautionary

instruction being given, the prejudice to petitioner is clear. The charge to the jury, requiring that they must find beyond a reasonable doubt that the conspiracy existed, was then a "mere formality." The court's failure to adequately instruct the jury was therefore error. This Court should grant certiorari to decide what instructions to the jury are required when a codefendant pleads guilty during trial.

Point IV

A violation of 21 U.S.C. § 846 is a lesser included offense of, and cannot therefore be used as a predicate for, a violation of 21 U.S.C. § 848 charged in the same indictment under the same set of facts.

A conspiracy to violate the federal drug laws, in violation of 21 U.S.C. § 846, is a lesser-included offense of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848, since the latter requires concerted action. *United States v. Jeffers*, 432 U.S. 137, 148-150 (1977); *United States v. Young*, 745 F.2d 733, 750 (2d Cir. 1984) ("§ 846 is a lesser offense of § 848 in the purest form"). This is indisputedly so where, as here, the § 846 and § 848 offenses are charged in the same indictment under the same set of facts. *Cf. Garrett v. United States*, 105 S.Ct. 2407 (1985) (Washington conviction was not lesser-included offense of broader continuing criminal enterprise charged in Florida). Since the § 846 conspiracy here was a lesser-included offense of the § 848 enterprise charged in the same indictment, it was error to permit that conspiracy to be double-counted as one of the "series of violations" required for conviction under § 848. *See* 21 U.S.C. § 848(d)(2).

The Court of Appeals disagreed, concluding that the § 848 "provides, in clear language, that *any* felony violation" of the federal drug laws is an eligible predicate and that there is no exclusionary or delimiting language as to § 846, § 963* or any other felony. (App. 5-6).

This Court has indicated that "[a]ll laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose." *United States v. Katz,* 271 U.S. 354, 357 (1926). The Court of Appeals acknowledged that there was nothing in the legislative history directed to this specific issue. (App. 6) The court, therefore, looked to the "general purposes" of the legislation—to control the illegal traffic in drugs with the full power of the federal government—and concluded that the purpose of the statute would be circumvented were the court to agree that the conspiracy offense may not be used as a predicate offense. (App. 6-7) But this Court has stated that it is most impermissible for a reviewing court to rely on its understanding of the broad purposes of a law, since "no legislation pursues its purposes at all costs." *Rodriguez v. United States,* 107 S.Ct. 1391, 1393 (1987).

Since proof of the "in concert" requirement of § 848 automatically proves the conspiracy charged under § 846, a literal construction of the "any series of violations" language of § 848 yields the unreasonable result of col-

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* Petitioner maintains that the same arguments he makes regarding § 846 apply to a conspiracy to import drugs in violation of 21 U.S.C. § 963.

lapsing the elements of the crime. This Court should grant certiorari to decide whether a violation of § 846, even though a lesser-included offense, can nevertheless serve as a predicate for a violation of § 848.

Point V

Pursuant to Rule 19.4 of the rules of the Supreme Court, petitioner joins in the petition for a writ of certiorari filed by any defendant-appellant in the proceeding below.

———o———

CONCLUSION

The Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit should be granted.

Dated: New York, New York
August 27, 1987

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUPIT

No. 86-5139

UNITED STATES OF AMERICA

vs.

FERNANDEZ, CARLOS EDUARDO
CARLOS EDUARDO FERNANDEZ,

Appellant

Appeal from the United States
District Court for the
District of New Jersey - Newark

(D.C. Crim. No. 85-00086-01)

Argued

January 22, 1987

Before: SEITZ, BECKER and MANSMANN,
Circuit Judges

(Filed June 30, 1987)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge*

This appeal arises from a final judgment of conviction of the appellant Carlos Fernandez for his participation in a conspiracy to import and distribute cocaine. Although Fernandez raises a number of contentions,[1] we

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[1]Fernanez also contends that: 1) he was denied his rights under Fed. R. Crim. P. 43 when he was briefly absent from trial due to a stomach virus, because that absence was not an intentional relinquishment of his right to be present at every portion of the trial, 2) permitting a detective involved in the investigation to testify as an expert on the use of code words by drug dealers deprived him of a fair trial, 3) the government's proofs established multiple conspiracies not subsidiary to the overall conspiracy charged, 4) the court failed to instruct the jurors adequately regarding the absence of co-defendants who pled guilty during trial, and 5) two photographs were erroneously admitted into evidence. We find no merit in any of these contentions.

are here primarily concerned with his arguments that conspiracies charged in violation of 21 U.S.C. §§ 846 and 963 may not also serve as predicate acts in the same indictment charging a violation of the continuing criminal enterprise statute, 21 U.S.C. § 848 ("CCE"), and his contention that telephone calls in violation of § 843(b) facilitating a § 846 conspiracy may not satisfy the series of violations requirement of § 848. In *United States v. Grayson*, 795 F.2d 278 (3d Cir. 1986) *cert. denied*, 107 S. Ct. 1899 (1987), we held that a prior conviction for a conspiracy offense may serve as a predicate act for a CCE offense. We hold now that a § 846 conspiracy may be considered by the jury as a predicate crime in the same indictment and under the same set of facts as a CCE charge under § 848. A violation of § 963 may constitute a predicate offense for a § 848 conviction as well. We hold too that telephone calls in violation of 21 U.S.C. § 843(b), made to facilitate a § 846 conspiracy, may satisfy the series of violations requirement of § 848. Accordingly, we will affirm the judgment of sentence.[2]

II.

The offense of engaging in a continuing criminal enterprise is established in 21 U.S.C. § 848(a) and is defined in 21 U.S.C. § 848(d).[3] To establish guilt under this statute, the government must prove:

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[2]While there may be problems with the formal terms of the sentence, the matter was not raised before us and in all events it may be presented to the district court. See Fed. R. Crim. P. 35.

[3]The text reads in relevant part:

§ 848. Continuing criminal enterprise

(d) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(Continued on following page)

1) a felony violation of the federal narcotics law

2) as part of a continuing series of violations

3) in concert with five or more persons

4) for whom the defendant is an organizer or supervisor

5) from which he derives substantial income or resources.

Grayson, 795 F.2d at 283-84.

The appellant's primary contention is that the district court erred as a matter of law in charging the jury that the narcotics distribution conspiracy (§ 846) charged in Count I of the indictment could serve as the predicate, or felony violation, of the federal narcotics law (number 1 above) to support a conviction under the continuing criminal enterprise statute.

Fernandez argues that a § 848 conviction requires proof of violations "in concert" with five or more others, and is therefore in effect a conspiracy statute. Any proof

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(Continued from previous page)

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

of the "in concert" requirement would automatically include proof of any conspiracy charged under § 846. Fernandez thus contends that to allow the same conspiracy to satisfy the "in concert" requirement as well as the predicate felony offense would offend the structure and common sense interpretation of the statute. In so doing, the Congressional scheme requiring a series of violations in concert with five or more other persons would, according to Fernandez, be "short-circuited."

The government argues that the plain language of the statute permits the violation of "any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony," 21 U.S.C. § 848(b)(1), to be used as a predicate crime for a § 848 conviction. Since a § 846 conviction is a felony violation, the government asserts that it may therefore serve as the underlying offense for a § 848 conviction.

Because resolution of the issues in this case involve the interpretation and application of legal precepts, our standard of review is plenary. *See Grayson,* 795 F.2d 278; *United States v. Adams,* 759 F.2d 1099 (3d Cir. 1985). *Cert. denied,* 106 S. Ct. 336 (1985).

III.

We do not believe that a § 846 conspiracy used as a predicate offense for a § 848 conviction collapses the elements of the CCE statute, nor denigrates the Congressional scheme. Our analysis begins with the language of the statute.

The statute provides, in clear language, that *any* felony violation of Subchapters I and II of Chapter 13 of

Title 21 is an eligible predicate. There is no exclusionary or delimiting language as to § 846, § 963, or to any other felony. We note that there is no statutory requirement that to be utilized as a predicate offense, the felony must be the subject of a prior indictment, nor is there any prohibition against the felony being charged in the same indictment. We are therefore compelled to follow the plain statutory language in the absence of a clearly expressed legislative intent to the contrary. *See United States v. Turkette*, 452 U.S. 576, 580 (1981). We have been unable to discover any legislative history directed to this specific issue, nor have the parties supplied any such references. We therefore, examine the general purposes of the legislation.

Through the passage of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, Congress clearly intended to create the separate criminal offense of a "continuing criminal enterprise." Described as the "King Pin" Statute, section 848 was aimed at those trafficking in prohibited drugs on a continuing, widespread, substantial and supervisory basis. *See, e.g., United States v. Johnson*, 575 F.2d 1347 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979); *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

House Report No. 91-1444, 91st Cong. 2d Sess. reprinted in 1970 U.S. Code Cong. & Admin. News, 4575-4576, indicates that the primary thrust of the bill was to control the illegal traffic in drugs with the full power of the federal government. Given this general philosophy, the approach of the bill was to provide severe criminal penalties for persons whose illicit manufacture or sale of controlled drugs was primarily for the profits to be derived there-

from. The criminal penalties for the manufacture, distribution or sale of drugs thus varies depending upon the danger of the drug *except* when a continuing criminal enterprise serves as the basis of the indictment. In that circumstance, the danger of the drug i not the basis of the penalty, but rather the inherent danger to society of the activity.

The purpose of § 848 is thus clearly different from other sections of the bill. Section 848 was designed to create the separate criminal offense of a "continuing criminal enterprise," punishable in addition to, and not as a substitute for, the predicate offenses. *See Garrett v. United States*, 471 U.S. 773, 785 (1984). It is not merely a more grandoise or far-reaching conspiracy statute, as Fernandez' argument appears to suggest. As the Court noted in *Garrett*, "[i]t runs counter to common sense to infer . . . that Congress intended to substitute the CCE offense for the underlying predicate offenses . . . rather than to permit prosecution for CCE in addition to prosecution for the predicate offenses. . . . It would be illogical for Congress to have intended that prosecutors choose between the predicate offenses and the CCE offense in pursuing major drug dealers." *Id.* at 785. The purpose of the statute would be circumvented were we to agree with the appellant that a conspiracy offense may not be used as a predicate offense. Accordingly, we find no statutory limitation on the use of a § 846 conspiracy as a predicate offense charged in the same indictment as a CCE count.

Fernandez insists nevertheless that to permit the use of a § 846 conspiracy would "collapse" the elements of the CCE statute, in that one element of the requisite proof of

a § 848 violation would then be missing. More specifically, Fernandez contends that since a narcotics conspiracy must always be proved to satisfy the "in concert" requirement of § 848(d)(2)(A), the same conspiracy may not be used as the felony violation required by § 848(d)(1) because this would in effect dispense with one element of the crime which the government must prove.

To allow a § 846 conspiracy to serve as a § 848 predicate offense, however, does not "collapse" the statutory scheme. Fernandez' argument presupposes that the original felony violation and the continuing series of violations are separate and distinct elements of the crime. The plain language of the statute makes it clear, however, that the elements are not completely separable, but overlap each other. Since the statute provides that the required felony violation must be one of a series of violations, an underlying conspiracy may serve as one of the series of violations required. *See United States v. Young,* 745 F.2d 733; *United States v. Ricks,* 802 F.2d 732 (4th Cir. 1986); *United States v. Brantley,* 733 F.2d 1429 (11th Cir. 1984), *cert. denied,* (470 U.S. 1006 (1984)); *United States v. Middleton,* 673 F.2d 31 (1st Cir. 1982).

We also note parenthetically that there is no requirement that the government must prove each element of § 848 by distinct and independent proof. Absent any clear Congressional directive, we are unwilling to read such a limitation into the statute. *See United States v. Young,* 745 F.2d 733.

Finally, Fernandez contends that the statute requires that the continuing series of violations requires conduct by the defendant other than a verbal agreement, and that

that conduct be undertaken in concert with five or more others. The district court erred, it is claimed, in charging that if the defendant and five or more other people were part of an agreement to commit violations of the federal drug laws the "five or more others" element of the statute would be satisfied, because such a charge would permit conviction on the basis of the defendant's participation in the agreement itself, rather than on the continuing series of violations undertaken by him.

This argument misconstrues both the charge to the jury and the requirements of the statute. The district court charged the jury that:

> The third requirement is that the defendant committed these violations in concert with five or more other persons. This does not mean that five or more persons must have participated with the defendant in committing each violation of the continuing series, or even that five or more persons were involved in committing each violation of the continuing series, or even that five or more persons were involved in committing any one of the offenses that is part of a series of offenses constituting the continuing criminal enterprise.
>
> Moreover, it is not required that all five persons were present at the same time or at the same place, and it is not required that the defendant had personal contact with each of the five or more persons.
>
> . . . it is sufficient that the government proves beyond a reasonable doubt that, during the course of the commission of continuing series of violations, the defendant and five or more other people were part of an agreement to commit violations of the federal drug law.
>
> If you determine that the defendants acted in concert with five or more persons when committing the

series of violations, you must then turn to the fourth element of the offense.

We find that the district court's charge properly construes the statute. The numerosity requirement of § 848 does not require that the five people be under the defendant's supervision at the same moment nor in the conduct of the same underlying felony, but must be under the defendant's supervision in the conduct of the same continuing criminal enterprise. *See United States v. Rhodes*, 779 F.2d 1019 (4th Cir. 1985) *cert. denied*, 106 S. Ct. 2916 (1986). This reasoning reaffirms our belief that the elements of a § 848 violation are not discrete, but overlap each other to a considerable degree. As such, they are not "collapsed" in the manner put forth by Fernandez.

IV.

Fernandez disputes as well the district court's charge that the use of a telephone to facilitate the § 846 conspiracy would constitute a violation of 21 U.S.C. § 843(b)[4] and satisfy the series of violations requirement of § 848. He makes two points in this regard. First, Fernandez argues that § 843(b) does not prohibit the use of a telephone to

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[4]Section 843(b) provides:

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication. 21 U.S.C. 843(b).

facilitate a narcotics *conspiracy*. Rather, he claims, it must be used to cause or facilitate the commission of an *act* constituting a felony and not an inchoate crime. Second, he claims that the evidence as to these counts was insufficient to support his conviction.

In this case Fernandez was charged in five counts of the indictment with knowingly using a telephone to facilitate the narcotics conspiracy, in violation of 21 U.S.C. § 843(b). The district court charged the jury that a felony under the narcotics laws includes violations of § 846—the conspiracy statute. In addition, the judge charged the essential elements of the telephone counts as:

> First: That on or about the date charged, the defendant used a telephone to facilitate the conspiracy to which the count refers; and
>
> Second: That the defendant did so knowingly and intentionally.
>
> Facilitate simply means "to make easy or less difficult."

Fernandez's argument thus turns upon the same point he presented as to the § 846 conspiracy. He argues that it is only the furtherance of the same conspiracy that was facilitated by the telephone calls, and thus their use as substantive felonies is erroneous. We find these contentions without merit. We reiterate our position that the CCE statute permits *any* felony violation to serve as a predicate offense. We note that § 843(b) clearly falls within this category. The CCE statute is not in any way diminished by allowing a "telephone count" to serve as a predicate. The other major elements of § 848 provide sufficient insurance for the use of that section to prosecute

professional criminals trafficking in drugs. *See United States v. Young*, 745 F.2d at 755. We therefore find that telephone counts in aid of a conspiracy may serve as predicate offenses for a § 848 violation. *See also United States v. Head*, 755 F.2d 1486 (11th Cir. 1985); *United States v. Young*, 745 F.2d 733, *United States v. Webster*, 639 F.2d 174 (4th Cir. 1981), *cert. denied*, 454 U.S. 857 (1981).

Fernandez also argues that the use of a telephone proscribed under § 843(b) is a felony only when the telephone is used to facilitate the commission of an overt act or substantive crime and not in furtherance of a conspiracy. We find this argument without merit. *See United States v. Thomas*, 586 F.2d 123 (9th Cir. 1978), cf. *United States v. Adams*, 759 F.2d 1099, 1117.[5]

Fernandez contends as well that the evidence was insufficient to support his conviction on these counts. We must determine whether there is substantial evidence, viewed in the light most favorable to the government, to uphold the jury's decision. *United States v. Adams*, 759 F.2d at 1113.

Our review of the record indicates substantial evidence to support the jury's conclusion. The government witness testified as to the meaning of the coded language in the telephone calls and the jury could certainly have concluded that the circumspect nature of the calls was consistent with a conspiracy to consumate the cocaine transactions.

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[5]In *United States v. Adams*, 759 F.2d 1099, 1117, we did not directly address the issue raised here. However, we upheld convictions under § 843(b) where the telephone was used in furtherance of a conspiracy to distribute and possess with intent to distribute controlled substances in violation of 21 U.S.C. § 846.

V.

Accordingly, we will affirm the judgments of conviction of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5139

UNITED STATES OF AMERICA

vs.

FERNANDEZ, CARLOS EDUARDO
Carlos Eduardo Fenandez, Appellant

(D. C. Crim. No. 85-00086-01)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE — DISTRICT OF NEW JERSEY

Present: SEITZ, BECKER and MANSMANN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the — District of New Jersey and was argued by counsel January 22, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered February 10, 1986, be, and the same is hereby affirmed.

ATTEST:

/s/ Sally Mrvos
Clerk

June 30, 1987

Certified as a true copy and issued in lieu
of a formal mandate on July 22, 1987.

Test:

/s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals,
for the Third Circuit.